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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1773

PALMER C. SCAFATI, ETC.,
PETITIONERS,

v.

RONALD FISHER,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MATHEW J. RYAN, JR.
District Attorney
Western District

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RONALD FISHER,
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The petitioners, Palmer C. Scafati, Etc., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the First Circuit rendered in these proceedings on March 4, 1971.

Opinions Below

The opinion of the United States Court of Appeals, as yet unreported, appears at Appendix A, infra, pp. A-1 - A-7. The opinion of the United States District Court for the District of Massachusetts, appears at Appendix B, infra,

pp. B-1 - B-10. The opinion of the Massachusetts Supreme Judicial Court is reported at 314 Mass. 549 (1968). Appendix C, infra, pp. C-1 - C-12.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on March 4, 1971. See Appendix A, p. A-1, infra. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., sec. 1254 (1).

Questions Presented

1. Whether the District Court abused its discretion in granting respondent an evidentiary hearing?
2. Whether the Court of Appeals erred in finding that the state court's conclusions were not fairly supported by its record?
3. Assuming, but not conceding, that the first confession (oral) was invalid, did the Court of Appeals err in finding that the second confession (written) was illegally obtained as the fruit of the first confession when full *Miranda* warnings were given prior to obtaining the second confession?

Prior Proceedings

Respondent, Ronald Fisher, was convicted in the Superior Court of Hampden County of murder in the first degree. He was sentenced to death. The conviction was affirmed by the Massachusetts Supreme Judicial Court on June 26, 1968, *Commonwealth* v. *Fisher,* 354 Mass. 549. On or about January 24, 1969, respondent, Fisher, filed a petition for a Writ of Habeas Corpus in the United States District Court, District of Massachusetts. On July 13, 1970, following an

evidentiary hearing, the District Court ordered issuance of the writ of habeas corpus. On August 11, 1970, petitioners, Scafati, Etc., filed an appeal from the decision of the United States District Court in the United States Court of Appeals. On December 15, 1970, the Court of Appeals remanded to the District Court, "for an additional finding of fact as to what warnings had been given prior to the time that a full oral confession was obtained, after the interrogation." On January 27, 1971, the district court found that full warnings had still not been given at that time. On March 4, 1971, the Court of Appeals affirmed the opinion of the district court. The decision was based on the finding that, "the written confession was clearly the fruit of the illegally obtained oral confession which immediately preceded it."

The Commonwealth of Massachusetts now petitions to the Supreme Court of the United States for a writ of certiorari to review that decision.

Argument

I. The District Court Abused Its Discretion in Granting Respondent an Evidentiary Hearing.

This Court in *Townsend* v. *Sain,* 372 U.S. 293 (1962) set forth those circumstances which compel a federal court, upon being petitioned for writ of habeas corpus, to hold an evidentiary hearing.

> In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. *Townsend* v. *Sain,* 372 U.S. 293 at 318.

Here, no dispute existed justifying such hearing. The district judge abused his discretionary power in holding one.

Respondent claims that his first set of *Miranda*[1] warnings were defective. This was explored at the evidentiary hearing. The district court agreed that the first warnings were defective. However, the Supreme Judicial Court did *not* find that these first warnings complied with *Miranda*. This finding was fairly supported by the record. The Massachusetts Supreme Judicial Court found that the two sets of warnings *taken together* adequately informed Fisher of his constitutional rights as required by *Miranda*. If this treatment of the question was incorrect as a matter of law, the Court of Appeals should have ruled on it as such.

The only fact question remaining is whether the initially inadequate warnings caused the second confession or whether the intervening complete warnings cancelled the effect of the earlier warning and confession. The facts of this question were not developed in the state courts. They were not explored at the evidentiary hearing. This question was not decided by the Massachusetts Supreme Judicial Court. If comity and the doctrine of exhaustion of state court remedies are to possess any viability, the Massachusetts courts should have been given an opportunity to pass upon this vital issue. *Needel* v. *Scafati*, 412 F.2d 761 (1st Cir., 1969) The Court of Appeals is unsure of the effect of the earlier questioning on the later confession. It states correctly that "the later confessions, if the fruit of this earlier violation must be excluded." Yet this causality is not found as a fact. Rather the court below claims that it is "impossible to be sure of the significance of these two [pre-warning] exchanges". Still, the court below asserts that despite this impossibility, the defendant must have become inescapably involved, that the second confession was clearly the fruit of the illegally obtained oral confession which immediately preceded it."

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[1] *Miranda* v. *Arizona*, 384 U.S. 436 (1966)

The basis of this conclusion is the Court's unsupported finding of fact that the complete *Miranda* warnings "of course did not warn the defendant that the first confession was invalid and could not be used against him". Moreover, the need for comity in federal-state relations dictate that the appropriate response of the district court in treating this fact question would have been to remand the case to the state court for an evidentiary hearing.

II. THE COURT OF APPEALS ERRED IN FINDING THAT THE DISTRICT COURT WAS OBLIGATED TO REVIEW THE STATE COURT'S CONCLUSIONS WHICH WERE FAIRLY SUPPORTED BY ITS OWN RECORD THAT THE WARNINGS WERE PROPER UNDER *Miranda*.

Under the provisions of 28 U.S.C., 2254 (d), findings of fact made by a state court should be treated as presumptively correct if those findings are fairly supported by the state court record. In our view, the court below erred in concluding that those findings were not fairly supported by the record.

As noted in the opinion of the Supreme Judicial Court, *Commonwealth* v. *Fisher,* 354 Mass. 549 (1968), Appendix C, infra, pp. C-1-C-9, Lieutenant (now Captain) Shea, after respondent's return from the polygraph test, was given certain warnings. Specifically according to Lieutenant Shea (*Commonwealth* v. *Fisher,* 354 Mass. 549, at 551-552, Appendix C, infra, pp. C-3 - C-4):

> At this time I informed him *again* of his right to an attorney, the fact that if he couldn't afford one, that he would be furnished with one; his right to remain silent, and the fact that anything he said would be used against him. I also informed him of his right to the use of the telephone. I told him that he could use the phone

> to call friends, relatives or even engage an attorney if he so desired. He declined the use of the telephone. (Emphasis added).
>
> * * *
>
> I said that, Ronald, you have a right to an attorney, an attorney can be present here now. You don't have to talk to us. If you do talk to us, anything you say will be used against you, "and I said, "there is a telephone, if you want to call anyone, call a lawyer, call any friend or for any reason, this is the telephone, go ahead and use it." He declined. He said, "No I don't want to use the phone."

From the use of the word, "again", the trial judge properly could have inferred — as did the majority of the Massachusetts Supreme Judicial Court — that the warnings given in the morning were identical to those given in the evening.

Since respondent was convicted of a capital offense, the Massachusetts Supreme Judicial Court reviewed the entire case under the provisions of Mass. Gen. Laws, ch. 278, sec. 33A-33G. Under those provisions, the Court is required to review the entire transcript in order to determine if justice requires the granting of a new trial or the entry of a verdict of a lesser degree of guilt.

Those warnings, in substance as well as in terms fully advised petitioner (1) that he had a right to remain silent; (2) that anything he said could be used against him in a court of law; (3) that he had the right to the presence of an attorney during questioning; and (4) if he couldn't afford an attorney, one would be furnished to him at the Commonwealth's expense prior to questioning. That their warnings were not literal extractions from the *Miranda* opinion is irrelevant. They unambiguously conveyed the substance of everything *Miranda* purported to require, and

the lack of the ritualistic *Miranda* formula does not detract from the efficacy of those warnings. *United States* v. *Venterpool,* 394 F.2d 697, 699 (2d Cir., 1968); *Keegan* v. *United States,* 385 F.2d 260, 264 (9th Cir., 1967), certiorari denied, 391 U.S. 967 (1968).

In these circumstances, the findings of fact made by the state courts should have been treated as presumptively correct, and the court below erred in disregarding those findings in the absence of any evidence to the contrary.[2]

III. The Court Below Erred in Concluding That All Incriminating Evidence was Inadmissible Because the Warnings Were Untimely.

The first warning given to respondent by Lieutenant Shea were given immediately after the scratch marks were noticed on his neck and back. Prior to that time, respondent had denied borrowing a friend's automobile keys and leaving the party. That denial was inconsistent with information Lieutenant Shea had received from other sources. *Commonwealth* v. *Fisher,* supra, at 550-551, Appendix C., p. C-3.

The court below allowed the conclusion of the district court stand that the warnings should have been given immediately upon petitioner's voluntary appearance at the police station. (Appendix A, infra, p. A-2; Appendix B, p. B-2).

What is in fact "custodial interrogation" within the meaning of *Miranda* must necessarily turn upon the facts and circumstances of each and every case. The mere fact

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[2] At the evidentiary hearing below, petitioner did not offer any evidence beyond the state court transcript. Although the district court below chose to discredit the testimony of Lieutenant Shea at the evidentiary hearing, nothing before the district court warranted departure from the presumption of correctness accorded by the provisions of 28 U.S.C. 2254 (d).

that he was questioned in the police station is not controlling. *Freige* v. *United States,* 408 F.2d 100, 102-103 (1st Cir., 1969); *Hicks* v. *United States,* 382 F.2d 158, 162 (D.C. Cir., 1967). In the present case, although at police request, respondent voluntarily came to the police station. There is no evidence in the record that petitioner felt himself to be under any significant restraint and he made no attempt to leave. Although Lieutenant Shea subjectively would not have permitted respondent to leave had he attempted to do so, Lieutenant Shea's attitude was not disclosed to respondent, and respondent has not established that Lieutenant Shea's undisclosed findings placed any significant restraint upon him. *Cf. Freige* v. *United States, supra,* at 103.

In short, petitioner voluntarily appeared at the police station, and there was no significant and objective restraint placed upon his freedom of movement until the scratch marks were discovered and the proper warnings were given. Thus, prior to the time that the warnings were given, respondent was not subjected to a "custodial interrogation," and the *Miranda* warnings need not have been given *Freige* v. *United States, supra; Hicks* v. *United States, supra; Clark* v. *United States,* 400 F.2d 83 (9th Cir., 1968).

In any event, even if the warnings should have been given prior to the discovery of the scratch marks, the court below erred in holding that the confession given in the evening (the second-written-confession) was tainted by that fact. In so holding, the court below relied upon everything which had occurred prior to the evening session, including respondent's having failed the polygraph test given in the afternoon. (*Commonwealth* v. *Fisher,* supra, at 552. Appendix C, p. C-3). As noted above, however, the warning given upon discovery of the scratch marks fully complied with the *Miranda* requirements. The polygraph test was administered after those warnings.

This Court has spoken on the admissibility of confessions preceeded by complete warnings when the complete warnings themselves followed an earlier illegally compelled confession. *U.S.* v. *Bayer,* 331 U.S. 532 (1949). The rationale was that, after the initial coercive circumstances have been removed, a confession can be made which is not caused by the first as it is free of the taint of the initial coercion. Whether the second is so separate from the first is a question of fact. It is the question of whether the second confession was the product of the first because the accused, feels he is inescapably implicated. The court found that the taint had dissipated because the second confession was made six months after the first.

In *Leyra* v. *Denno,* 347 U.S. 556 (1954), this Court applied the same principle and found the controlling facts invalidating a second confession to be the continuity of the two interrogations. The second interrogation followed the first without interruption, in the same location. They formed one continuous process, with the full warnings occurring at the end of the process.

In *Wong Sun* v. *U. S.,* 371 U.S. 471 (1963), the Court approved the admission into evidence of a second confession because it was so clearly free of the taint of the first. Several days after being illegally arrested, the accused had voluntarily returned to the police station to confess.

The most explicit statement is in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). There the court clarified that its holding controlled not whether the accused can speak voluntarily without benefit of warnings and counsel but whether the police can interrogate him and use his words. Volunteered statements are always admissible.

Of second confessions, in the companion case of *Westover* v. *U.S.,* 384 U.S. 436 (1966), this Court said again the test was of whether the two confessions were the product of one interrogation process (with the complete warnings

merely an event occurring near the end of the process) or the product of two distinct interrogations, separate in time and place. Here, respondent appeared first on July 9, 1966, and was questioned July 11, 1966.

If the statements elicited by the first interrogation determining the commencing of the second and armed the second round of questions with information, the first interrogation's illegality taints the statements elicited by the second interrogation. The fact issue is the existence and extent of a causal relation between the first and second confessions. Each case must be examined *ad hoc* in its own set of circumstances.

In these circumstances, the court erred in relying upon the fact, and it cannot be realistically maintained that the failure to give the warning prior to the discovery of the scratch marks tainted the written confession given later that evening.

Finally, disparity among the Circuits is found in evaluating the factors determining whether two sets of warnings and confessions constitute one process or two separate events.

Unlike *Bayer, supra,* where six months intervened between confessions, most cases concern interrogations much closer in time.

In *Gilpin* v. *United States,* 415 F.2d 638 (5th Cir., 1969) that court determined that a final confession four days after interrogation was so closely connected with the earlier confession it was not the product of an unfettered choice. While in *Mapys* v. *United States,* 409 F.2d 964 (10th Cir., 1969) four days were held not long enough to separate two interrogations. Yet in *Harney* v. *United States,* 407 F.2d 586 (5th Cir., 1969) the Fifth Circuit found that one confession fed the second round of interrogations, which ordinarily would have been dispositive of the issue, however, that court accorded great weight to evidence of the

accused's understanding of the second confession which was found to be admissible. In the instant case respondent signed a confession which had a printed warning on each page.

At best the total balancing of factors determining the outcome of a given case is unpredictable and hardly uniform in view of the differing weights in each circuit's emphasis and evaluation.[3]

Clearly, this Court's supervision is required to guide law enforcement officials in their daily investigations in order to insure uniform application of federal law.

Conclusion

For the reason stated above it is respectfully submitted that the petition for certiorari be granted.

Respectfully submitted,

MATHEW J. RYAN, JR.
District Attorney
Western District

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[3] See also *Shinker* v. *United States*, 408 F.2d 361 (9th Cir., 1969) four days found long enough; *Comacho* v. *United States*, 467 F.2d 39 (9th Cir., 1969), incriminating statements were found admissible although made within hours after the initial unconstitutional questioning.

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 7705

RONALD FISHER,
PETITIONER, APPELLEE,
v.
PALMER C. SCAFATI, etc.,
RESPONDENT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*

Leonard E. Gibbons, Assistant District Attorney, Western District, with whom *Matthew J. Ryan, Jr.*, District Attorney, Western District, was on brief, for appellant.

Richard J. Rubin, with whom *Gainsburg, Gottlieb, Levitan & Cole* was on brief, for appellee.

March 4, 1971

ALDRICH, *Chief Judge.* We face the unpleasant task of deciding whether a state trial court's findings, subsequently affirmed, *Commonwealth* v. *Fisher*, 1968, 355 Mass. 549, that a defendant was given timely and complete *Miranda* warnings [1] were properly disregarded by the district court on a petition for habeas corpus, and the further question whether the district court's findings to the contrary should themselves be affirmed. The issue of warning is vital as petitioner, hereinafter the defendant, was convicted of

[1] *Miranda* v. *Arizona*, 1966, 384 U.S. 436.

murder following a trial in which his oral and written confessions prominently figured. There is no claim that they were unlawfully obtained other than by the failure of the police to observe the requirements of *Miranda,* decided a few weeks before the interrogation in question and concededly applicable.

The district court's obligation to review the state court proceedings for inadequate factfinding was made plain in *Townsend* v. *Sain,* 1963, 372 U.S. 293. Following the procedure there outlined, having determined on the basis of the state record that the state court conclusions were not adequately supported, the district court conducted its own hearing. It received the oral testimony of one witness, Captain, formerly Lieutenant, Shea, the police detective who had been in charge of the investigation, in addition to the recorded state court testimony of that witness and of two other police detectives. It expressly declined to consider the defendant's own testimony. Thereafter it made extensive findings. Concededly, no warnings were given at the outset of the interview in question. The district court found the entire interrogation custodial. It further found that even when, in the course of the questioning, certain warnings were given, they were incomplete. It accordingly ordered the conviction set aside. The Commonwealth appealed. We remanded for an additional finding of fact as to what warnings had been given prior to the time that a full oral confession was obtained, after the interrogation. The district court then found that full warnings had still not been given at that time.

Procedurally, two issues are involved. The first is whether the district court was warranted in conducting a hearing, as against accepting the state court's determination. In order to hold that it should not have held a hearing we must conclude not just that it was obliged to find the state findings "fairly supported by the record," 28 U.S.C.

§ 2254(d)(8) (Supp. V, 1970), so that a hearing was not mandatory, but that holding a hearing was an abuse of discretion. *Townsend* v. *Sain*, ante, at 318; *Brown* v. *Allen*, 1953, 344 U.S. 443, 463-64, 478, 506 (opinions of Reed and Frankfurter, JJ.). The defendant bore the burden of obtaining a hearing below, but the Commonwealth, on appeal, must show such abuse. In terms of the present case, if, as will appear, the great weight of even the Commonwealth's evidence indicated lack of adequate warnings, the district court was warranted in reopening to consider the question de novo. The second issue is whether the district court adequately found the facts on the basis of the record as a whole, including its evidentiary hearing. Here defendant originally had the burden as a result of section 2254(d). However, the Commonwealth, having lost, is now obliged to meet the ordinary requirement of showing error.[2]

Turning from procedure to substantive facts, again there were two issues to be resolved: the timeliness, and the completeness, of the warnings. The Commonwealth is obliged to succeed on both.

I

With respect to timeliness, the facts are these. The police having discovered on July 7, 1966 that one Carolyn Willis had been murdered, initiated an intensive investigation. The defendant was interviewed, non-custodially, by

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[2] It has been suggested that habeas procedure permits a single district judge to make findings offsetting the determination of the entire state supreme court. This is a misapprehension. The state appellate court has not made findings; it has merely held that those of its trial court were supportable. It is true that the ultimate findings, on a new record, by the federal trial judge will prevail over those of the state trial judge, assuming the federal appellate courts find them warranted, but this is far from the overruling of the entire state system by the action of a single judge. And, of course, even this action is limited to federal laws, and federal constitutional rights. 28 U.S.C. § 2241.

Lt. Shea on July 9. He acknowledged being at a party the night of July 1, where the victim was last seen alive, and claimed that he had remained there until leaving with his cousin and a friend. Subsequently Shea was told that the defendant had borrowed car keys and had absented himself from the party for an hour following the victim's departure. On the morning of July 11 the defendant was requested to come to the police station. Shea testified, however, that he was not then a suspect, and only became such during the questioning. Early in this interview Shea noticed what appeared to be fingernail scratches on the defendant's neck. He asked what they were and defendant said that a Ruth Davis, a former girl friend, had scratched him at the party. Shea asked him to remove his shirt, and saw what appeared to be three more scratches on his back. It was at this point, according to Shea, that defendant became a suspect. Shea first testified before the district court that at this point he stopped the interrogation and gave the warnings. But, on cross-examination, he conceded that he had forgotten two other questions he had asked, *after* seeing the marks on defendant's back. He asked what the marks were, and defendant said that they, too, were fingernail scratches inflicted by Ruth Davis. He then asked defendant if he had borrowed a car, absenting himself from the party. Defendant denied this. Shea responded that he had information that he had, and only then gave warnings, complete, or incomplete, as the case may be.

Thereafter defendant was asked whether he was willing to take a lie-detector test. He said he was, and was taken to Boston. On his return to the police station he was told that he had done badly on the test. He was also told that Ruth Davis had been seen, had denied scratching him, and clearly had fingernails too short to make such scratches. He was again given warnings, following which he made

a full oral confession. Subsequently, after new and, concededly, full warnings, he signed a written confession.

The district court's conclusion that the entire July 11 interview was custodial, because defendant became a suspect as soon as Shea had received information contrary to his July 9 account of leaving the party with his cousin and friend, raises a serious question as to what constitutes *Miranda* custody. Defendant was not arrested on the morning of July 11. His July 9 visit had been brief, and at his own initiation. Shea then asked him to report anything he could find out, and he had apparently agreed. In view of the general breadth of the investigation the district court points to no reason for defendant to have attached particular significance to his being requested to return, or for believing forthwith that he was in custody. Custody, in the *Miranda* sense, must require at least some objective manifestation that the defendant was "deprived of his freedom of action in [a] significant way." *Miranda,* ante, at 444. *See United States* v. *Hall,* 2 Cir., 1969, 421 F.2d 540, *cert. denied* 397 U.S. 990; *Freije* v. *United States,* 1 Cir., 1969, 408 F.2d 100, 103, *cert. denied* 396 U.S. 859.

Shea stated that after he discovered the scratches he would not have permitted the defendant to leave. It is reasonable to assume that defendant, too, realizing the possible significance of the scratches, recognized that they would have such an effect. We agree with the state court finding that this marked the commencement of *Miranda* custody.

Even with this amplification of the district court's findings, however, a problem of timeliness remains: two questions were asked after defendant was in custody. The later confessions, if the fruit of this earlier violation, must be excluded. The two questions, while somewhat cumulative, produced exchanges adverse to defendant. They could have led him to a belief that he was trapped, and thus

could have caused either the later confessions, or his agreement to proceed with a lie-detector test, the result of which in turn could have induced the confessions. Though it is impossible to be sure of the significance of these two exchanges, we agree that, as Justice Whittemore said in his dissent, the defendant "proceeded gradually into a state of inescapable involvement," 354 Mass. at 558, in some part because of the illegal questioning. However, we need not decide whether these questions bore a sufficient causal relation to the confessions, owing to a further fault of much clearer impact.

II

Following our remand, the district court found that the several warnings given during the day, including those immediately prior to the oral confession, were not substantially complete. We have reviewed the record. The reasons given by the district court for not accepting Shea's monotonously uniform testimony before it as to the full content of the warnings, as opposed to his state court testimony, varying, but always possessing some degree of incompleteness, which was confirmed by the two other officers, need not be repeated. We find the reasoning persuasive. *Miranda* was a new experience to the police forces of the country. While the police here had had the case explained to them orally, they had been given no written outline of its several details. We can understand that some might be unintentionally overlooked. The district court's finding that this was what occurred, until the point of actually signing a written confession was reached, must stand.

By this time, of course, it was too late. The written confession was clearly the fruit of the illegally obtained oral confession which immediately preceded it. *Harrison* v. *United States,* 1968, 392 U.S. 219, 222; The Supreme Court, 1967 Term, 82 Harv. L. Rev. 63, 221-22 (1968); *see Kil-*

lough v. *United States,* D.C. Cir., 1962, 315 F.2d 241. All that intervened between the two confessions was a full *Miranda* warning, which of course did not warn the defendant that the first confession was invalid and could not be used against him. The use of both confessions invalidated the trial.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

RONALD FISHER

v.

PALMER C. SCAFATI, Superintendent,
Massachusetts Correctional Institution, Walpole

UNITED STATES DISTRICT COURT FOR MASSACHUSETTS

MEMORANDUM AND ORDER FOLLOWING EVIDENTIARY HEARING

July 13, 1970

GARRITY, J. The evidentiary hearing has been held and the sole witness called by respondent was Lieutenant (now Captain) Shea of the Springfield Police Department.[1] Petitioner called no witnesses of his own but made the entire trial transcript, including the transcript of the voir dire hearing, part of the record. The parties made oral arguments and filed memoranda of law.

On the first issue, whether the interrogation of petitioner on July 11, 1966 was custodial from its inception, the court expands its findings of fact beyond those stated in its memorandum and order dated December 30, 1969 as follows: petitioner went to the Springfield Police Headquarters on Monday, July 11, at the request of the police. The victim's decomposed body had been discovered on July 7 and an autopsy performed that night indicated that

[1] Two other witnesses, police officers Doyle and Tisdel who were present during petitioner's interrogations at police headquarters, were also sworn at the outset of the hearing and sequestered; but were not called to the stand by either party. Thus their testimony given at the voir dire in the state court stands unmodified.

she had been slain. The police knew that she had attended a party on July 1 and had arrested as material witnesses and were holding Dwight Walker, the occupant of the apartment where the party had taken place, and Winfred Phillips, a boy friend of the deceased. On Friday, July 9, petitioner had been interviewed briefly by Lieut. Shea at police headquarters, stating that he had attended the party and had been drinking and had seen the deceased at the party; had remained at the party, until about midnight when he left with Bragis Sullivan and his cousin, Jack Fisher; and did not see the deceased leave the party and had no knowledge regarding the crime.

On the morning of July 11, after petitioner arrived at the station but before his interrogation began, Lieut. Shea learned of a significant discrepancy between the information given by the petitioner on July 9 and a statement received from another witness. Petitioner had said that he remained at the party until leaving with Bragis Sullivan and Jack Fisher. The other witness said that, while the party was in progress, petitioner obtained the keys to Dwight Walker's automobile and left alone and returned about an hour later.

Lieut. Shea began questioning petitioner shortly before 11:00 A.M. Officers Doyle and Tisdel remained present and participated in the questioning from time to time. No one else was present. The interrogation was conducted in an office which had windows. No warnings of any sort were given to the petitioner before Lieut. Shea started the questioning.

The lieutenant first asked petitioner if he was at the party and saw the victim and petitioner replied affirmatively, stating that he had known her from before. Shea showed him a newspaper photograph of the victim and petitioner identified it, stating that he knew her as Winfred Phillips's girl friend. Shea asked if petitioner was present

when a collection was taken up in order to purchase more liquor and beer and petitioner said that he was. Shea asked if he was present when Dwight Walker returned with the liquor and petitioner replied affirmatively. Shea asked, "Isn't it true that you took his car keys and you asked him for his car keys at that time or shortly after he came back and went out alone?" Petitioner said, "No that isn't so." Shea stated, "We have information that you did."

At this time Shea noticed what appeared to be fingernail scratches on petitioner's neck and asked, "What are those scratches on your neck, Ronald?" Petitioner said they were fingernail scratches. Shea asked when he got them and petitioner said, "On the night of the party, July 1." Shea asked who did this to him and petitioner named a former girlfriend, Ruth Davis. Shea asked if petitioner had any more scratches on him and requested that he remove his shirt. When petitioner did so Shea observed what looked like three more fingernail scratches on petitioner's back. Shea then stopped the interrogation and told petitioner he was a suspect in the case and informed him of certain constitutional rights.

The foregoing facts are found by the court on the basis of Lieut. Shea's testimony given at the voir dire in the state court on September 27, 1966, about ten weeks after the date in question. At that hearing Shea also testified that petitioner had been a suspect since 10 or 11 o'clock that morning and, as a suspect, he would not have been allowed to leave had he wished to. At the hearing in this court Shea testified that petitioner became a suspect in his mind at the same time he told petitioner that he was a suspect and gave him the constitutional warnings, that is, after noticing the fingernail scratches on petitioner's neck. Shea further testified in this court that petitioner was free to leave until after he noticed the fingernail scratches. However, he said nothing to the peti-

tioner to the effect that he was free to go or that he need not answer the questions. On the other hand, petitioner made no attempt to leave. In both courts Shea testified that until he noticed the fingernail scratches, his interrogation of petitioner was investigatory and not accusatory.

The court holds that the police should have given petitioner the constitutional warnings required by *Miranda* v. *Arizona,* 1966, 384 U.S. 436, before putting any questions to him at 11:00 A.M. on July 11. The safeguards commanded by the *Miranda* decision come into play "when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any way." (348 U.S. at 477). The "salient features" of the four cases decided in *Miranda* were "incommunicado interrogation of individuals in a police-dominated atmosphere" (348 U.S. at 445). See opinion, White, J. dissenting, in *Orozco* v. *Texas,* 1969, 394 U.S. 324, 328.

Contrary to the Commonwealth's contention, Shea's questioning of the petitioner was in no sense part of a routine investigation. Cf. *United States* v. *Gibson,* 4 Cir., 1968, 392 F.2d 373. The purpose of questioning petitioner was not to determine whether or not a murder had been committed, cf. *Michaud* v. *Robbins,* 1 Cir., 1970, 424 F.2d 971, or to ascertain background facts regarding the victim or the party at which she was last seen alive. Several police officers had been investigating the crime for four days. Two of the five men who had attended the party had already been arrested as material witnesses. A third, Bragis Sullivan, had also been summoned to police headquarters and, while petitioner was being questioned, was in another room. Most important, the police knew before beginning the interrogation that at an interview two days previously petitioner had said something inconsistent with information just received from another witness about his

having left the party alone for approximately one hour. It cannot be doubted that, had petitioner not been at the station when the inconsistency between his previous statement and that of another witness developed, the police would have picked him up promptly for further questioning.

The plain purpose of the interrogation of petitioner on the morning of July 11 was to determine his involvement in the murder and to elicit admissions from him. And, before any warnings were given, Shea was successful, at least to the extent of eliciting from petitioner a denial that he had borrowed Walker's car and left alone which was inconsistent with the statement of another person at the party (whom the record does not identify). Petitioner was alone, confronted by three policemen, in a room at police headquarters. The fact that the room had windows in it is of little significance.

The court's holding is not that questioning of a witness becomes "custodial interrogation" within the meaning of the *Miranda* case simply because it occurs at a police establishment. See *Hicks* v. *United States,* U.S. App. D.C., 1967, 382 F.2d 158, 162. All the circumstances must be taken into account. The test does not hinge on "the inner intentions of the police", *United States* v. *Hall,* 2 Cir., 1962, 421 F.2d 540, 544. See also *Freije* v. *United States,* 1 Cir., 1969, 408 F.2d 100, 103. As explained in the *Hall* case, at 544:

> "The [Supreme] Court could scarcely have intended the issue whether the person being interrogated had 'been taken into custody or otherwise deprived of his liberty in any significant way' to be decided by swearing contests in which officers would regularly maintain their lack of intention to assert power over a suspect save when the circumstances would make such a claim absurd, and defendants would assert with equal regu-

larity that they considered themselves to be significantly deprived of their liberty the minute officers began to inquire of them."

The court finds that the petitioner had become a suspect before Lieut. Shea started questioning him on July 11 and would not have been permitted to leave the police station had he requested. The court concludes that the police violated petitioner's rights under the Fifth Amendment to the Constitution of the United States by failing to explain to him his rights to silence and to the presence of an attorney before questioning him on July 11.[2]

The second issue framed in the court's previous order was whether petitioner was apprised of his constitutional rights, referring to the warnings which were given to him by Lieut. Shea shortly after Shea noticed the scratches on his neck. The Commonwealth has conceded all along that the petitioner was entitled to be given the *Miranda* warnings no later than at the time when Shea first told him about his constitutional rights. The factual issue is, what did Shea tell him at that time? The testimony in the state court has been analyzed thoroughly in the opinions of the Massachusetts Supreme Judicial Court in *Commonwealth* v. *Fisher,* 1968, 354 Mass. 549, and in this court's prior memorandum and order. This court has again read all of the testimony in the state court relating to this issue.[3]

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[2] The pre-*Miranda* rights of a person appearing voluntarily at a police station at the request of the police are analyzed in the Model Code of Pre-Arraignment Procedures, Tentative Draft No. 1, Mar. 1, 1966, of the American Law Institute, esp. §§ 2.01(2), 3.05(2) and 5.10 and in the appended commentary. Briefly, the code treats such a person as if he had been arrested unless the authorities tell him that he is under no obligation to remain.

[3] It has not heretofore been noted that petitioner testified repeatedly in the state court that Lieut. Shea advised him, first after he exhibited the scratches on his back and on numerous subsequent occasions before he signed his confession on the morning of the following day, that he "didn't have to say anything but it would go easy on me if I did" and that Shea said nothing whatever to him about

It was supplemented at the evidentiary hearing in this court by an incredible performance by Lieut. Shea, who gave virtually letter-perfect recitals of the *Miranda* warnings as having been given to the petitioner on at least four occasions beginning with the first occasion soon after noticing the scratches on petitioner's neck. But it developed at the hearing that Shea had never even seen an excerpt from the *Miranda* decision before July 11, 1966 and that his only knowledge of the *Miranda* requirements was the result of an oral explanation by lawyers in the District Attorney's office to which he was assigned. Lieut. Shea's testimony in this court about constitutional warnings given the petitioner was the final improvement on his testimony in the state court, where he started off in his testimony at the voir dire by stating, "I told him that he was entitled to be represented at all times by counsel. I told him that he could remain silent, and if he said anything it could be used against him and I asked him if he would voluntarily take a lie detector test that day." After having been asked leading questions in the state court, Shea added to his testimony the required advice about petitioner's entitlement to the presence of an attorney at the interrogation and the right to court-appointed counsel if he could not afford to engage an attorney of his own. In this court, Shea would not concede on cross-examination that the events of July 11, 1966 were fresher in his mind in September 1966 than they were in 1970, despite the fact that he was unable to recall various aspects of his testimony at the state court trial.

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his right to counsel; and that Shea and the other officers kept telling him about the difference between manslaughter and murder and that manslaughter is treated with leniency and is "something where you can get a pardon." Because of the findings of the trial judge and jury before whom petitioner testified and petitioner's failure to testify in this court, no weight has been given by this court to any portion of the state court record consisting of petitioner's testimony.

At the evidentiary hearing in this court, Lieut. Shea testified that he had refreshed his recollection from a memorandum and notes made by officers Doyle and Tisdel, which he believed were in the Springfield Police Headquarters. However, none of the three officers brought the papers with them to the hearing and the prosecuting attorney knew nothing about them. Witnesses Doyle and Tisdel were not called by the Commonwealth although present in the witness room while Shea was testifying. The court infers that they would stand by their testimony as given in the state court, where both testified to all of the constitutional warnings given by Shea to petitioner on the morning of July 11 and neither made reference to any advice to petitioner that counsel would be appointed for him if he could not afford one and that counsel could be with him during the interrogation.

The court adopts the version of events recounted by officers Doyle and Tisdel in the state court and that given by Lieut. Shea when he first testified about the subject in the state court and rejects the unpersuasive amplification of Shea's testimony offered in this court.[4] The court concludes that the Springfield police ignored the "absolute necessity", *Orozco* v. *Texas, supra* at 326, of giving the complete, fourfold warnings explicitly required by the *Miranda* decision and thereby violated petitioner's rights

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[4] It is no wonder that Shea's explanation to petitioner of his constitutional rights on the morning of July 11, 1966 was imprecise and inadequate in view of his never having received from any superior a written statement of the *Miranda* safeguards which had been enunciated by the Supreme Court of the United States four weeks before. The court takes judicial notice of the fact that even today, more than four years after the *Miranda* decision, federal investigating agents do not rely upon their memories but read from a printed card when advising a person being interrogated about his constitutional rights to remain silent and to have the immediate assistance of counsel.

under the Fifth Amendment to the Constitution of the United States.

At oral argument following the submission of briefs the District Attorney suggested for the first time that full constitutional warnings which may have been given on the evening of July 11, about ten hours after the first warnings given on that morning, would cure any deficiencies in the advice given in the morning. No precedent was cited in support of this proposition which is contrary to the plain language of the *Miranda* case and to the holding in *Westover* v. *United States,* one of the four cases decided by the *Miranda* opinion, at 384 U.S. 494-497. Although the petitioner did not finally confess until late that night and may well have been given complete warnings before he started dictating a confession, these came after he had traveled from Springfield to Boston, a distance of about 85 miles, to take a lie detector test, which he was told he had flunked and, as stated in the dissenting opinion in the Supreme Judicial Court, had proceeded into a state of inescapable involvement. See generally, George, *The Fruits of Miranda: Scope of the Exclusionary Rule*, 1967, 39 U. of Col. L. Rev. 478, 492-494.

The third issue framed for the evidentiary hearing, whether petitioner waived his constitutional rights, has been mooted by the court's decision that he was never told what they were. A person cannot waive rights which he may not know he has. The fact that a person being interrogated may be aware of his rights without warnings being given is immaterial. Anyone held for questioning at a police station has the right to be advised explicitly of the safeguards established by *Miranda* v. *Arizona.* As therein explained, at 468-469:

> "The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of

> the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. Assessments of the knowledge the defendant possessed, based on information as to his age, education, intelligence, or prior contact with authorities, can never be more than speculation; a warning is a clearcut fact. More important, whatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time."

Parenthetically, it is basic that a valid waiver will not be presumed from failure to ask for a lawyer or from the fact that a confession was eventually obtained. "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda* v. *Arizona, supra* at 475.

Accordingly, petitioner's motion to suppress all statements made by him on July 11, 1966 and during the early morning hours of July 12, including his confessions and the sketch of the scene of the crime which he drew, should have been allowed. Petitioner's admissions on those days was important evidence against him at the trial leading to his conviction. Therefore he is in custody of the respondent Superintendent of the Massachusetts Correctional Institution at Walpole in violation of the Constitution of the United States, 28 U.S.C. § 2241(c)(3), and a writ of habeas corpus ordering his release from custody will issue unless he is timely retried without the use of tainted evidence.

(s) W. Arthur Garrity, Jr.
United States District Judge

APPENDIX C

COMMONWEALTH *vs.* RONALD FISHER.

Hampden. March 4, 1968. — June 26, 1968.

Present: WILKINS, C.J., SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

Evidence, Admissions and confessions, Photograph. *Constitutional Law,* Assistance of counsel, Admissions and confessions. *Practice, Criminal,* Waiver, Assistance of counsel. *Waiver.*

Testimony in a murder case warranted findings that, after the defendant at the request of the police had voluntarily gone to a police station one morning some days after the murder, the full constitutional warnings required by *Miranda* v. *Arizona,* 384 U.S. 436, were understandably communicated to him that morning before an in custody investigation and its accusatory focus on him had begun, as well as again upon a continuation of the interrogation in the evening of the same day, and that by declining use of a telephone offered by the police and otherwise he affirmatively waived his right to have counsel present at his interrogation; and confessions obtained from him in the absence of counsel following the evening interrogation were not inadmissible as tainted with initial illegality in the morning [552-555]; CUTTER, J., concurring in the result; WHITTEMORE, J., dissenting.

Constitutional rights of a defendant indicted for the murder of a woman were not violated by the taking of photographs of scratches on his back and neck shortly after he was taken into custody and when he was without counsel and either before or after he was given the constitutional warnings, and there was no error in the admission of the photographs in evidence at his trial. [556]

INDICTMENT found and returned in the Superior Court on

September 15, 1966.

A motion to suppress was heard by *Macaulay, J.*, and the case was tried before him.

Richard J. Rubin of New York (*Edward N. Hurley* with him) for the defendant.

Matthew J. Ryan, Jr., District Attorney (*Leonard E. Gibbons*, Assistant District Attorney, with him), for the Commonwealth.

SPIEGEL, J. The defendant was tried on an indictment which charged that on July 1, 1966, he "did assault and beat Carolyn Willis with intent to murder her, and by such assault and beating did kill and murder the said Carolyn Willis." The jury returned a verdict of guilty of murder in the first degree. The case was tried subject to G.L. c. 278, §§ 33A-33G, and is hereby appeal.

We summarize pertinent portions of the evidence. The defendant was questioned by the Springfield police as one of several persons who had been at a party attended by the victim on the evening of the murder. At that time, the defendant denied any knowledge of the crime. Subsequently, the police discovered an inconsistency between the defendant's report and that of another person interviewed. The police left a telephone message at the place where the defendant was staying asking him to come to the police station on Monday morning, July 11, 1966. In response to this request, the defendant voluntarily came to the station. He arrived about ten or ten thirty in the morning and was interviewed by three police officers. One of these, Lieutenant Shea, testified on voir dire that, after reviewing the events of the party, he asked the defendant whether, after the victim's departure, he had borrowed a friend's automobile keys and left the party alone. The defendant denied this. Lieutenant Shea "told him we 'have information that you did.' " At "about the same time" Shea noticed "what appeared . . . to be . . . fingernail scratches on his neck,"

and asked the defendant about them. The defendant said they were scratches inflicted on the night of the party by a former girl friend. Shea said, "Have you got any more on you? Take off your shirt." The defendant did so, and the officers observed three more scratches on his back. At this point, Lieutenant Shea "stopped the interrogation and informed him of the fact that he was a suspect," and "informed him of his constitutional rights." At the voir dire, Shea testified as follows: "I told him that he was entitled to be represented at all times by counsel. I told him that he could remain silent, and if he said anything it could be used against him, and I asked him if he would voluntarily take a lie detector test that day." Later in the voir dire, Shea testified that on the defendant's return from the lie detector test in the evening, "I informed him *again* of his right to an attorney, the fact that if he couldn't afford one, that he would be furnished with one . . ." (emphasis supplied). At the trial before the jury, Shea testified that in the morning "I told him that he was entitled to the service of an attorney . . . . [T]hat he had the right to a telephone, and an attorney would be furnished to him at the expense of the Commonwealth if he was not able to afford one . . . . I told him he had a right to remain silent and that anything he did say would be used against him if he chose to say anything to us." Either before or after these warnings were given, photographs were taken of the scratches on the defendant's neck and back. No further interrogation then took place. The defendant was taken to Boston, given a polygraph test, and then was returned to the Springfield police station about nine thirty or ten o'clock in the evening. On his return, the defendant was given further warnings. Lieutenant Shea described these on the voir dire as follows: "At this time I informed him again of his right to an attorney, the fact that if he couldn't afford one, that he would be furnished with one; his right to remain silent; and the

fact that anything he said would be used against him. I also informed him of his right to the use of the telephone. I told him that he could use the phone to call friends, relatives or even engage an attorney if he so desired. He declined the use of the telephone." On cross-examination on the voir dire, Shea gave this version of the evening warning: "I said that, 'Ronald, you have a right to an attorney, an attorney can be present here now. You don't have to talk to us. If you do talk to us, anything you say will be used against you,' and I said, 'there is a telephone, if you want to call anyone, call a lawyer, call any friend or for any reason, this is the telephone, go ahead and use it.' He declined. He said, 'No, I don't want to use the phone.' " Before the jury, Shea testified that after this conversation he asked the defendant, "[D]o you want to talk further with us about this case?" and the defendant replied, "I will." At the voir dire Lieutenant Shea testified that he told the defendant he had failed the polygraph test and that in his absence the police had interviewed his former girl friend and had determined that she could not have scratched him. The defendant said, "I know it's very bad for me....[I]t looks very bad for me." The interrogation continued until about eleven o'clock, at which time the defendant confessed. About four o'clock of the following morning, the confession was reduced to writing and the defendant signed it. The defendant also made a sketch of the scene of the crime. The photographs, the oral and written confession, and the sketch were admitted in evidence over the defendant's objections.

The defendant's principal assignments of error concern the denial of his motions to suppress this evidence on the ground that the police did not conform with the requirements set forth in *Miranda* v. *Arizona*, 384 U.S. 436. At the conclusion of the voir dire on the motion to suppress, the judge made the following findings: "[A]t the time when the suspicion of crime was focused upon the defendant, he was

advised by the police that he had a right to remain silent, need not answer questions. He had a right to counsel and the services of counsel. And, Lieutenant Shea told him that if he couldn't afford one, that he would be furnished one. Anything he might say would be used against him and he could use the telephone to call friends, relatives or engage an attorney if desired.... [T]he oral statements made and the written statements . . . were voluntarily made by the defendant without threats or duress or promises, or inducements or hope, or favor of reward."

The defendant contends that the record of the voir dire testimony does not support the judge's finding that the defendant was informed in the morning of his right to have counsel provided at the Commonwealth's expense. While Lieutenant Shea omitted this item in his original recitation of the warnings given in the morning, when he described the warnings given in the evening he said that he "again" advised the defendant of his right to counsel and of "the fact that if he couldn't afford one, that he would be furnished with one." From this testimony, the judge was warranted in determining that this portion of the warning was given in the morning. The correctness of this determination is borne out by Lieutenant Shea's testimony before the jury, recited above. We are of opinion that the warnings which the judge found were given to the defendant in the morning were in this respect in conformity with the rules set out in *Miranda* v. *Arizona*, 384 U.S. 436.

The defendant also contends that the morning warnings were not given before the commencement of the defendant's in custody interrogation, and that as a consequence the confessions obtained many hours later were tainted with an initial illegality. In *Escobedo* v. *Illinois*, 378 U.S. 478, 492, the Supreme Court of the United States held that the right to counsel attaches "when the process shifts from investigatory to accusatory—when its focus is one the accused and

its purpose is to elicit a confession." In *Miranda* v. *Arizona, supra,* 477, it was said that an individual must be warned of his rights "when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way." The defendant contends that the *Miranda* case modifies the "focus" rule of *Escobedo* v. *Illinois, supra,* by advancing the time when the right to counsel attaches (and warnings must be given) ahead of the point when the investigation becomes accusatory to the time when "custody" begins. As applied to the case at bar, there is no conflict between these two standards. Lieutenant Shea's interrogation of the defendant became an in custody interrogation at the point when Shea observed the scratches and the investigation "focused" on the defendant.[1] At this point the warnings were given. Until this time, there is nothing to suggest that the defendant, who voluntarily came to the station at the telephoned request of the police, was "in custody at the station or otherwise deprived of his freedom . . . in any significant way." We believe the warnings given the defendant in the morning were timely.

The defendant further argues that he was not apprised of his right to have an attorney present at the interrogation. In *Miranda* v. *Arizona, supra,* it was held that "[A]n individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation." 384 U.S. at 471. Lieutenant Shea testified on the voir dire that he

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[1] Lieutenant Shea testified on the voir dire as follows: Q. "He had been a suspect since 10:00 or 11:00 o'clock . . . [in] the . . . morning?" A. "That's correct." Q. "And is it fair to say, Lieutenant, that as a suspect, if he decided he was going to walk out and go back to New York, he wouldn't have been allowed to, would he?" A. "That's correct." This testimony does not suggest to us that the defendant was in custody at the time he arrived at the police station, but would have been restrained from leaving "as a suspect," i.e., after he became one.

warned the defendant in the morning that "he was entitled to be represented at all times by counsel." Lieutenant Shea testified that on the defendant's return from Boston, he told him, "[Y]ou have a right to an attorney, an attorney can be present here now." The ability to understand verbal communication, of course, varies among individuals. We are convinced on this record, however, that the defendant's right to the presence of an attorney was understandably communicated to him. We have said that the "principles announced in the *Miranda* case must be applied reasonably and with common sense and do not constitute an arid, ritualistic formula to be administered inflexibly." *Commonwealth* v. *Wilbur*, 353 Mass. 376, 383. We believe that the reasonable import of the warnings given the defendant were sufficient to apprise him of his right to have an attorney present.

The defendant contends that there was no evidence that, even if adequate warnings were given, the defendant knowingly waived his right to have counsel present at the interrogation. It was said in the *Miranda* case at 475 that "valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained." In the instant case, there is more evidence of waiver than the simple silence of the defendant or the mere fact that he confessed. In the morning, after the warnings were given and the defendant declined the offered use of the telephone, the defendant was asked if he would go to Boston and undergo a polygraph test. Lieutenant Shea testified that he said "Now, before you can take this test, you've got to sign a waiver of your rights in which you have been informed of all your rights, and that you voluntarily took this test." The defendant replied, "I will," and then went to Boston and signed such a waiver. On his return, after again being warned, the defendant was offered the use of

the telephone to call friends or an attorney. The defendant said, "No, I don't want to use the phone." Immediately thereafter, he was asked, "[D]o you want to talk further with us about this case?" He replied, "I will." Within an hour the defendant confessed. The record discloses affirmative actions on the defendant's part in declining the offer of a telephone to obtain counsel,[2] in agreeing to go to Boston and to sign a waiver in regard to the polygraph test, and in expressing his willingness to continue the interrogation after the evening warnings. The facts reveal an affirmatively cooperative attitude on the defendant's part which presents an entirely different case from the passive model from which the Supreme Court in the *Miranda* case said a valid waiver will not be presumed. We hold that the Commonwealth here has sustained its burden in this regard.

We deal briefly with the defendant's other assignments of error as they do not require any extended comment. The defendant claims error in the refusal of the judge to instruct the jury in his charge that the defendant was not informed of his right to have counsel present and to have counsel provided by the Commonwealth in the event that he could not afford one. Our discussion above disposes of that issue. There was no error. Nor was there an abuse of discretion in the judge's denial of the defendant's motion for a new trial. There was no prejudice in admitting the written statement of the witness Dwight Walker in corroboration of his oral testimony. There was no error in admitting the photographs of the scratches on the defendant's back and neck. It was not a violation of his constitutional rights to take the photographs. *Schmerber* v. *California*, 384 U.S. 757. In cross-examination a sixteen year old

[2] The record shows that the defendant had previously employed the services of an attorney at his home in New York State, and that this same attorney subsequently appeared in the defendant's behalf at the trial of the defendant in Massachusetts.

acquaintance of the defendant who was called by him testified that in the course of a conversation on the evening of the murder the defendant had asked her to have intercourse with him. The denial of the motion to strike was within the judge's discretion, notwithstanding the risk of raising collateral issues.

We have reviewed the entire record and do not believe that justice requires us to grant a new trial or the entry of a verdict of a lesser degree of guilt. See G.L. c. 278 § 33E, as amended by St. 1962, c. 453.

Judgment affirmed.

CUTTER, J. (concurring) I think that the ambiguous and somewhat contradictory evidence on the voir dire does not warrant the conclusion that Fisher (although warned of his right to remain silent and to be represented by counsel) was informed by the Springfield police on the morning of July 11, 1966, (a) that he could have counsel present at any police questioning, or (b) that, if he could not afford counsel, counsel would be provided for him at State expense. Perhaps the *Miranda* case, 384 U.S. 436, 468-479, on the present record, must be inflexibly construed as requiring that Fisher's apparently truthful confession be excluded if less than the complete warning (prescribed by the majority opinion in that case) was given on the morning of July 11. I perceive in the record no occasion for any warning until shortly after Fisher's unsatisfactory explanation of the scratches upon his person. If the *Miranda* case must be inflexibly interpreted, Fisher's death sentence should be reversed, and the present case should be remanded for a new trial in which the record concerning the police investigation less than a month after the *Miranda* decision can be developed more clearly and fully. Understandably a more complete record was not thought necessary at the

carefully conducted trial only about three months and a half after that decision.

The voir dire testimony warrants the following conclusions: (1) Fisher was given the complete *Miranda*-type warning and an opportunity to use the telephone on the evening of July 11. This was before any significant interrogation after his return to Springfield from Boston. There he and others (not like him suspected but only material witnesses) had taken polygraph tests after signing written waivers which are not before us. (2) No significant questioning (other than that involved in the polygraph test, not itself admissible in evidence, *Commonwealth* v. *Fatalo*, 346 Mass. 266) took place during the trip to Boston. (3) The police were attempting to comply fairly with requirements for custodial interrogation as they understood them. (4) Fisher proceeded cooperatively to answer police questions after each set of warnings. From his whole conduct, it could be inferred that he had decided to attempt by himself to allay police suspicions without asserting any rights of which he had been told.

It seems to me, in all the circumstances, that the voir dire evidence should be regarded as warranting the conclusion that there was substantial compliance with the purport of the *Miranda* decision. Cf. the *Westover* situation discussed in the *Miranda* case, 384 U.S. 436, 494-495. I do not think that this record discloses literal compliance.

I concur in the result.

WHITTEMORE, J. (dissenting) For the waiver to be made "knowingly and intelligently" as required by the *Miranda* rule, as to which the Commonwealth has the burden of proof, it must be shown that an understandable statement of the rights was given (384 U.S. at 479). The statement was required at least as early as the discovery of the scratches. It is not determinative that the express confes-

sions were made in the evening interrogations. The defendant's custody began about 11 A.M., some twelve hours before his oral confession, and in the course of the day and evening he proceeded gradually into a state of inescapable involvement. The question whether he would take a lie detector test was a part of the police interrogation and the test was undoubtedly a factor leading to the later confession.

The evidence, to me, does not permit the conclusion that in the morning the defendant was "clearly informed that he... [had] the right to consult with a lawyer and *to have* the lawyer *with him during* interrogation" (384 U.S. at 471) (emphasis supplied). Informing the defendant that he was entitled "to be represented at all times by counsel," "to the services of an attorney," and "to the use of the phone for the purpose of engaging an attorney" did not clearly inform him that he had a right to have the lawyer present at the police station and to consult with him before he answered any more questions. On the record it was only in the evening that the defendant was told that "an attorney can be present here now." It may be that the warnings given in the morning were as full as those given in the evening. Possibly in the use of the word "again" Lieutenant Shea intended so to state. But this possibility is not enough to establish compliance with the rule. Hence, I conclude that the judgment should be reversed.

The testimony (given by three officers and the defendant) at the voir dire did not permit the conclusion that it had been shown that the defendant had been told in the morning that an attorney would be provided if he could not afford one. Lieutenant Shea's testimony at the trial, as first given, also omitted this. It was only after a leading question which, although excluded, operated to call his attention to the omission, that the witness, in answer to a succeeding question, gave the testimony stated in the majority opinion.

The evidence is inconsistent and an unsatisfactory basis for a finding that the morning warning had been shown in this respect to be adequate.

A retrial would permit a determination to be made on evidence free of the present uncertainties and ambiguities.

In this case the police pressures were not undue, the guilt of the defendant is clearly established by his confession, and it may be that whatever was said to the defendant he would have continued to talk. I believe, however, that the *Miranda* rule, so long as it remains an applicable principle of constitutional law, must be applied as declared.